NON-PRICE EFFECTS OF MERGERS: A PRIMER[1]

Prepared by

Greg Gundlach, AAI

AMERICAN ANTITRUST INSTITUTE
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Non-price Competition and Effects

Non-price Competition

Non-price competition involves activities by firms, excluding those associated with price, that alter demand for the firm's goods or services or those of their competitors.[2] As a form of rivalry, non-price competition is ubiquitous. Firms commonly compete through non-price strategies including differences in level of quality, provision of service, novelty of innovation, method of distribution, and provision of information, among other means.

Non-price Effects

Related to non-price competition, the term "non-price effects" is used in antitrust to characterize the outcomes of competition and rivalry that manifest in ways other than price. Non-price effects focused on in US merger analysis include those that relate to "quality," "variety," "service," and "innovation." For example, the 2010 merger guidelines include that, in addition to price effects, "[e]nhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation."[3] Concerns for non-price effects are also present in other areas of antitrust.[4]

Beyond the non-price effects of quality, variety, service, and innovation; other non-price effects exist and may also be of interest to merger analysis. For example, the AAI has identified outcomes relating to the resilience or sustainability of competition in some markets as a potential concern. The AAI has also reinforced concerns raised by others that have arisen at the intersection privacy concerns and availability and the control of information in markets including the Internet. Importantly, just as there exist many different dimensions of non-price competition, there exist many different types of non-price effects.

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[2] Spence, Michael, *Non-price Competition*, AMERICAN ECONOMIC REVIEW (February 1977), 255-259, at 255 ("Non-price competition, ... refers to [non-price] activities by firms or corporations that shift the demands for products, their own and those of their rivals." Brue, Stanley L., and Campbell R. McConnell, ECONOMICS – PRINCIPLES, PROBLEMS AND POLICIES (2002, 43.7-.8) (Non-price competition is a marketing strategy "in which one firm tries to distinguish its product or service from competing products on the basis of attributes like design and workmanship").

[3] Department of Justice and Federal Trade Commission, HORIZONTAL MERGER GUIDELINES, §1 (2010).

[4] For example, in vertical restraints doctrine, the most historically relevant explanation of resale price maintenance's (RPM) harmful effects involves its use to forestall retail innovation. Scholars in economics, marketing, and law have long recognized that practices which restrict intrabrand competition adversely affect innovation brought about through more efficient (i.e., less costly) forms of retailing. A consistent theme across these fields is that RPM is widely recognized to have the effect of slowing down the pace of these retail innovations in ways that deny consumers access to their associated benefits of lower retail prices. Warren S. Grimes, A Dynamic Analysis of Resale Price Maintenance: Inefficient Brand Promotion, Higher Margins, Distorted Choices, and Retarded Retailer Innovation, 55 ANTITRUST BULLETIN 101, 126 (2010) ("[w]hether the motivation for RPM comes from retailers who wish to avoid discount competition or from a manufacturer who wants to maintain a high margin, the impact of RPM is to deny an efficient retailer the potent weapon of a lower price in gaining market share against rivals. New and efficient retailing methods can be slowed or stymied by widespread use of RPM. This point has been made over and over again by students of RPM.").

Complexity of Effects

Because non-price effects involve the outcomes of competition (including both price and non-price competition), these effects can be complex. Several examples highlight this complexity. *First*, non-price effects can coexist with price effects. For example, non-price and price effects may result from competition as in the case where a merger results in effects for both price and non-price dimensions of competition. *Second*, non-price effects may arise in the absence of price effects as in the case where a merger impacts non-price dimensions of competition, but not price dimensions. *Third*, price and non-price effects can interrelate with one another in various ways. For example, quality and innovation can impact price. Higher quality or more innovative products may be able to demand higher prices and vice versa. Relatedly, quality, innovation, and variety can impact one another. Innovation may impact quality where innovation involves the enhancement of product quality existing in a market. Innovation may also increase (or decrease) variety where a new product adds to the existing products in a market. Innovation may decrease variety where the novelty of a new product cannibalizes demand for prior products. Thus, innovation may define the quantity of innovation in a market. Services may also be considered to add to the innovation of a product and may further be considered part of product quality. Other interrelationships are also possible. The important point is that the nature of non-price competition is complex and many interactions can exist between price and non-price effects as well as across the different types of non-price competition and non-price effects.

Significance of Non-price Competition and Effects

Non-price competition is a significant form of competition in the economy. Non-price outcomes in the form of non-price effects are also important. The significance of non-price competition and non-price effects are substantiated in business, economics and law.

Business

Business research confirms that non-price strategies of competition are extensively relied upon by firms. In fact, much of what is written and taught about competition in business schools involves non-price competition. In strategic management, for example, only one of the three generic strategies historically identified for achieving a sustainable competitive advantage emphasizes price.[5] Instead of cost (i.e., price) leadership, firms may rely upon non-price strategies such as differentiation and focus. More recent conceptions of strategies for achieving a sustainable advantage over competition add to these non-price strategies by including innovation, synergy, and relationships. Similarly, in marketing, price is considered but one element of the "marketing mix" or the array of controllable marketing variables that firms use to pursue their goals in a target market.[6] Together with price, these variables include what marketer's call the "4Ps" - product, promotion, place (i.e., distribution) and price. Recent versions of the marketing mix include a 5th "P" in the form of persons.[7] In practice, much of a marketing managers time is spent optimizing the marketing mix by assigning an amount of the marketing budget to be spent on

[5] Michael Porter, COMPETITIVE ADVANTAGE (1985).

[6] American Marketing Association 2016 ("Marketing mix: The mix of controllable marketing variables that the firm uses to pursue the desired level of sales in the target market.").

[7] American Marketing Association 2016 ("The most common classification of these factors is the four-factor classification called the "Four Ps"- price, product, promotion, and place (or distribution)."

each of the 4 P's that maximizes total sales, profits, or other established goals.[8] Consistent with the role and importance of non-price competition and strategies in business practice, business research in strategic management, marketing and related fields applies theory and conduct empirical research to understand non-price strategies of competition and non-price effects of competition. This research includes specific examination of quality, service, variety and innovation.

Economics

The economics literature long ago recognized the role and impact of non-price competition in a market. In the 1930's Edward Chamberlin and Joan Robinson contributed to the development of a theory of "monopolistic competition" to describe markets in which each firm sells a different (i.e., differentiated) product but competes with a few or many other firms. The theory predicts that in both the long run and short run, monopolistic competition is allocatively and productively inefficient. However, the theory recognizes that monopolistic competition can bring about greater diversity in product offerings and this diversity can benefit consumers through greater choice. The nature and welfare contributions of non-price competition arising from product differentiation continue to be a focus in economics. Following methodological trends, this literature increasingly includes technical models and empirical research addressing the implications of product differentiation under different assumptions and considering different variables. The literature elaborates on the non-price dimensions and effects of competition including the importance of innovation.[9] Growing attention in economics is also found for the different dimensions and effects of non-price competition in the form of variety, quality, and service.

Law

The importance of non-price competition and the protections granted to non-price competition through the antitrust laws has been recognized by the U.S. Supreme Court. Over 50 years ago, in *U.S. v. Continental Can* (1964)[10] the Supreme Court held that rivalry on quality is "meaningful competition ... of the type and quality deserving of ... protection" under the antitrust laws.[11] In 1956, Continental Can was the second largest producer of metal containers in the U.S (33% of all metal containers sold in the U.S.) but produced no glass containers. Haxel-Atlas Glass Company was the largest producer of glass containers (9.6% of shipments), but produced no metal containers. Continental Can acquired the Haxel-Atlas Glass Company, but that acquisition was challenged by the government as violating Section 7 of the Clayton Act. A significant issue in the subsequent litigation was how a relevant product market should be defined for purposes of reviewing a merger of companies that manufacture different but related products. The case addressed non-price dimensions of competition involving product differences including quality. The Supreme Court found that glass and metal containers were in the same relevant market, despite a lack of cross-price elasticity. According to the Court, the district court's finding of

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[8] American Marketing Association 2016 ("Optimization of the marketing mix is achieved by assigning the amount of the marketing budget to be spent on each element of the marketing mix so as to maximize the total contribution to the firm." "Contribution may be measured in terms of sales or profits or in terms of any other organizational goals.")

[9] Dennis W. Carlton and Mark Israel, *Will the New Guidelines Clarify or Obscure Antitrust Policy?* THE ANTITRUST SOURCE 1, 2 (October 2010) ("... the economic literature recognizes that much of the gain in consumer welfare over time can be attributed to technological innovation and new products.") available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Oct10_FullSource.authcheckdam.pdf

[10] United States v. Continental Can Co. 378 U.S. 441 (1964).

[11] 378 U.S. 441, 456 (1964).

separate markets, "employed an unduly narrow construction of the 'competition' protected by §7."[12] As described by the Court, the lack of price effects is "relevant . . . but not determinative,"[13] because while rivalry on quality terms "may not be price competition[,] . . . it is never the less meaningful competition between interchangeable containers."[14] It is competition "of the type and quality deserving of §7 protection and therefore the basis for defining a relevant product market."[15] The case makes clear that the antitrust laws protect price as well as non-price competition.[16] The nature and importance of the different forms of non-price competition (e.g., product quality, variety, service and innovation) have also been recognized in antitrust law. For example, the National Cooperative Research Act of 1984[17] provides limited antitrust exemptions for certain joint research and development activity. More recently, antitrust scholars Neil W. Averitt and Robert H. Lande make a clear case for the role and importance of variety in antitrust through their work on consumer choice.[18]

Non-price Competition and Effects in U.S. Merger Analysis

Recognizing the importance of non-price competition, U.S. antitrust enforcement agencies have increasingly incorporated non-price considerations and effects in the analysis of mergers. An historical overview of U.S. Merger guidelines documents this increasing recognition.

Past Guidelines

The first reference to non-price effects emerged in the 1992 merger guidelines where, despite emphasis on price effects, non-price effects in the form of product quality, service, or innovation were mentioned in two footnotes.[19] The 1997 revisions to the efficiencies section of the merger guidelines expanded the role of non-price considerations.[20] However, while recognizing non-price considerations in merger

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[12] 378 U.S. 441, 452 (1964).
[13] 378 U.S. 441, 455 (1964).
[14] 378 U.S. 441, 456 (1964).
[15] 378 U.S. 441, 449 (1964).
[16] Sagers and Brunell (2014), at 567 ("In short, Continental Can makes clear that because the antitrust laws protect non-price competition as well as price competition, functionally interchangeable economic substitutes can be in the same relevant market even when consumers are not price sensitive.").
[17] Public Law no. 98-462, 98 Statute 1815 (codified in 15 U.S.C.A 4301-4306.
[18] Neil W. Averitt and Robert H. Lande, C*onsumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law*, 10 LOYOLA CONSUMER LAW REVIEW 44, 44 (1998) ("Such consumer choice exists when two fundamental conditions are present: (1) there must be a range of consumer options made possible through competition; and (2) consumers must be able to select freely among these options. ... The antitrust laws are intended to ensure that the marketplace remains competitive, so that a meaningful range of options is made available to consumers, unimpaired by practices such as price fixing or anticompetitive mergers."). See generally Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST LAW JOURNAL 713 (1997).
[19] Department of Justice & Federal Trade Commission, HORIZONTAL MERGER GUIDELINES (1992) (§0.1 n.6 "Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation." §2.12 n.20 "Similarly, in a market where product design or quality is significant, a firm is more likely to be an effective maverick the greater is the sales potential of its products among customers of its rivals, in relation to the sales it would obtain if it adhered to the terms of coordination.").
[20] Department of Justice & Federal Trade Commission, MERGER GUIDELINES (1997) (§4, "... mergers have the potential to generate significant efficiencies by permitting a better utilization of existing assets, enabling the combined firm to achieve lower costs in producing a given quantity and quality than either firm could have achieved without the

efficiencies, the 1997 guidelines did not include discussion of non-price effects as potential forms of anticompetitive harm. The Merger Guidelines Commentary in 2006 went further in recognizing the role of non-price effects. [21] The guidelines acknowledged that non-price based efficiencies, such as improved quality and services and investments in innovation were potentially cognizable when assessing a merger; but also acknowledged that market power may be exercised by reducing quality, or slowing innovation. The guidelines also recognized that non-price effects may occur in addition to, or instead of, price effects.

Current Guidelines

The revised horizontal merger guidelines in 2010 took a big step forward in embracing and elaborating on non-price considerations and effects in merger analysis. The revised Guidelines state at the outset that "[e]nhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation. Such non-price effects may coexist with price effects, or can arise in their absence."[22] The new guidelines also begin to flesh out in greater detail the nature of non-price effects relevant to merger enforcement. For example, the guidelines state that documents and testimony from merging parties that they intend to "reduce product quality or variety, with-draw products or delay their introduction or curtail research and development efforts after the merger . . . can be highly informative in evaluating the likely effects of a merger."[23] The guidelines also make cognizable non-price related

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proposed transaction. Efficiencies generate through merge can enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products." "Efficiencies also may result in benefits in the form of new or improved products, and efficiencies may result in benefits even when price is not immediately and directly affected." "Other efficiencies, such as those relating to research and development, are generally less susceptible to verification and may be the result of anticompetitive output reductions."

[21] Department of Justice & Federal Trade Commission, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES (2006) (Foreword, "Mergers between competing firms, i.e., 'horizontal' mergers, are a significant dynamic force in the American economy. The vast majority of mergers pose no harm to consumers, and many produce efficiencies that benefit consumers in the form of lower prices, higher quality goods or services, or investments in innovation." Introduction, "Market power may be exercised, however, not only by raising price, but also, for example, by reducing quality or slowing innovation." Introduction, "Many mergers, moreover, enable the merged firm to reduce its costs and become more efficient, which, in turn, may lead to lower prices, higher quality products, or investments in innovation." Introduction, To this end, the Agencies examine whether the merger of two particular rivals matters, that is, whether the merger is likely to affect adversely the competitive process, resulting in higher prices, lower quality, or reduced innovation." §2, "The Agencies may find that a proposed merger would be likely to cause significant anticompetitive effects with respect to innovation or some other form of non-price rivalry. Such effects may occur in addition to, or instead of, price effects." §4, "Mergers also may lead to enhanced product quality or to increased innovation that results in lower costs and prices or in more rapid introduction of new products that benefit consumers." §4, "As the Guidelines state, efficiencies 'can enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products." §4, "Efficiencies in the form of quality improvements also may be sufficient to offset anticompetitive price increases following a merger. Because a quality improvement involves a change in product attributes, a simple comparison of pre- and post-merger prices could be misleading. A careful analysis of the effects of changes in product attributes and prices on consumer welfare is likely to be necessary." §4, The Guidelines define cognizable efficiencies to be 'merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service.'").

[22] Department of Justice and Federal Trade Commission, HORIZONTAL MERGER GUIDELINES, §1 (2010).

[23] Department of Justice and Federal Trade Commission, HORIZONTAL MERGER GUIDELINES, §2.2.1 (2010).

incentives involving innovation. For example, the guidelines indicate that the agencies may consider whether a merger is likely to result in a "a reduced incentive to continue with an existing product-development effort or reduced incentive to initiate development of new products"[24] Finally, the new guidelines detail that for purposes of merger enforcement, considerations involving market definition will based not only on "consumers' ability and willingness to substitute away from one product to another in response to a price increase" but also on consumers' response to a "non-price change such as a reduction in product quality or service."[25] Other references to non-price competition and non-price effects are also found in the 2010 merger guidelines.

Current Challenges and Future Directions

Despite the aforementioned developments challenges remain in the quest to incorporate consideration of non-price competition and effects in US merger analysis.[26]

Do the U.S. Merger Guidelines sufficiently recognize non-price considerations and effects?

One important question is whether the current guidelines adequately recognize non-price competition and effects. Assessments of the 2010 merger guidelines suggest that the guidelines could go further in recognizing non-price competition and effects in U.S. merger analysis. A forceful advocate of this view was former FTC Commissioner and past AAI Advisory Board member Tom Rosch.[27] According to his assessment "the new Guidelines did not go far enough" in their recognition of non-price competition and effects and "the overwhelming impression from the revised guidelines is that price effects remain paramount."[28] As an example, Commissioner Rosch observes that, other than a new section on innovation and product variety, the 2010 guidelines are relatively silent on non-price forms of competition in their discussion of unilateral and coordinated effects.[29] Mr. Rosch also describes that in some contexts (most notably in regard to inferences to be drawn from high price margins) the revision

[24] Department of Justice and Federal Trade Commission, HORIZONTAL MERGER GUIDELINES, §6.4 (2010).

[25] Department of Justice and Federal Trade Commission, HORIZONTAL MERGER GUIDELINES, §4 (2010).

[26] An excellent recent example of the challenges faced by antitrust in considering non-price competition and effects is the case of FTC v Lundbeck, Inc (No. 08–6379, 2010 WL 3810015 (D. Minn. Aug. 31,2010), aff'd, 650 F.3d 1236 (8th Cir. 2011)). In that case the Eighth Circuit affirmed a bench verdict that found a merger to monopoly that resulted in a 1400% price increase, was not only legal, but effectively was not even subject to antitrust law. The case involved significant questions about non-price effects relating to competition involving product quality. See Chris Sagers and Richard M. Brunell, *FTC v. Lundbeck: Is Anything in Antitrust Obvious, Like, Ever?* 59 ANTITRUST BULLETIN 557, 567 (2014) ("Lundbeck's most perverse consequence is that it is precisely those markets lacking price competition that need non-price rivalry the most. Moreover, to the extent that Lundbeck is taken to require a showing of significant cross-price elasticity in order for two products to be in the same relevant market, it has potentially far-reaching consequences in other markets where competition primarily occurs on non-price attributes, including a fair portion of the health care sector and consumer markets for free Internet or medias services. Indeed, across-price elasticity requirement may not only immunize mergers in price-insensitive markets, but the logic would seem to allow naked horizontal restraints (such as market allocation agreements) in such markets on the ground that the conspirators are not horizontal competitors at all because their products are not in the same relevant market."). See also Gregory Dolin, *Non-price Competition in "Substitute" Drugs: The FTC's Blind Spot*, 59 ANTITRUST BULLETIN 579 (2014).

[27] J. Thomas Rosch, *Economics in Merger Analysis*, 59 ANTITRUST BULLETIN 111 (2014).

[28] Rosch (2014), at 116.

[29] Rosch (2014), at 116.

takes a step backward and relies even more on prices and margins in some contexts.[30] Similar views are also held by others including authors Dennis Carlton and Mark Israel who contend through their assessment that there is a "failure to emphasize properly the importance of non-price competition" in the 2010 Merger Guidelines.[31] According to these authors, "relative to the attention paid to price competition, the current Guidelines could be interpreted as placing too little emphasis on non-price competition."[32] Going forward, questions for consideration in this realm include:

- *Do the U.S. merger guidelines adequately recognize the importance and role of non-price competition and effects in the analysis of a merger?*
- *Should the guidelines incorporate more emphasis of non-price competition and effects?*
- *If so, how should the guidelines be changed to better address non-price competition and effects?*

Should non-price effects beyond product quality, variety, service and innovation be considered?

Another important question is whether additional non-price effects should be considered in the analysis of a merger. At present the U.S. merger guidelines focus on non-price effects involving product quality, variety, service and innovation. Each of these effects is described in various ways, but their focus is consistent. A useful discussion involves whether there are other non-price effects of importance to competition and antitrust and therefore of interest to the analysis of a merger. More generally it is important that a systematic approach be developed for identifying and distinguishing non-price effects that merit interest in antitrust. Important questions in this realm include:

- *What non-price effects arise from competition?*
- *What non-price effects should be of interest in the analysis of a merger?*
- *How should these non-price effects be identified?*

Is the current approach for analyzing a merger adequate when considering non-price competition and effects?

A further question is whether going forward the current approach for analyzing a merger is adequate when considering non-price dimensions and effects of competition. According to Commissioner Rosch a challenge with the merger guidelines is that they "lack a clear framework for analyzing non-price considerations."[33] The guidelines do acknowledge that "Enhanced market power can be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation."[34] However, for simplicity of exposition, the guidelines take the position that they will "generally discuss the analysis of such effects in terms of price effects." Consequently, when considering whether a merger may lead to a substantial lessening of non-price competition, the agencies describe that they will "employ an approach analogous to that used to evaluate price competition."[35] This approach involves several steps: defining the

[30] Rosch (2014), at 116.
[31] Carlton and Israel (2010), at 1.
[32] Carlton and Israel (2010), at 2.
[33] Rosch (2014), at 117.
[34] Department of Justice and Federal Trade Commission, HORIZONTAL MERGER GUIDELINES, §1 (2010).
[35] Department of Justice and Federal Trade Commission, HORIZONTAL MERGER GUIDELINES, §1 (2010).

relevant market (i.e., Market Definition), analyzing the market's structure (i.e., Market Participants, Market Shares, and Market Concentration), evaluating applicable theories of harm (i.e., Unilateral Effects, Coordinated Effects), assessing relevant circumstances (i.e., Powerful Buyers, Entry, etc.), and appraising cognizable efficiencies (i.e., Efficiencies). An important question is whether non-price dimensions and effects of competition can be properly understood and assessed through this price-based approach. Important questions in this realm include:

- *Does an approach analogous to evaluations of price competition suffice for evaluating non-price competition?*
- *Is there a need for a different approach for evaluating non-price effects?*
- *What modifications or changes are required?*

As one example of the challenge, the guidelines indicate that questions of market definition involve the willingness of customers to substitute away from one product to another in response to a price increase "or a corresponding non-price change such as a reduction in product quality or service."[36] However, the guidelines provide "no explanation" of how to apply the price-based hypothetical monopolist market definition test, or its operationalization through the so-called SSNIP test, to non-price changes."[37] What the process of market definition and the SSNIP test should look like for non-price changes involving reductions in product quality or service, and reduced variety or diminished innovation, is not elaborated upon. Other aspects of the current approach present similar challenges.

Do the guidelines offer satisfactory guidance for understanding and evaluating the harms and benefits of a merger in respect to each non-price effect?

More particular questions concern whether the Guidelines offer adequate guidance for understanding and evaluating the harms and benefits of a merger in respect to product quality, variety, service and innovation. These questions direct attention to (1) what is "known" about non-price dimensions of competition, and (2) the application of this knowledge to understanding a merger's effects. Applying traditional fields of economics, research at the intersection of antitrust and economics offers market and organizational-level insights about non-price competition and recently has cultivated individual-level insights through behavioral economics. However, relevant insights are also found beyond economics. For example, organizational and managerial-level insights are found in the business disciplines (e.g., strategic management, marketing, finance, accounting, etc.). Relevant insights are also found in other areas of inquiry (e.g., complexity science, systems dynamics, etc.). It is important that relevant insights from other fields be identified and applied to analyze non-price competition and effects in a merger.[38] Questions in this realm include:

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[36] Department of Justice and Federal Trade Commission, HORIZONTAL MERGER GUIDELINES, §4 (2010).

[37] Rosch (2014), at 117. For purposes of defining relevant product market and evaluating the importance of competition impacted by a merger, the SSNIP test inquires whether a "hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products ("hypothetical monopolist") likely would impose at least a small but significant and non-transitory increase in price ("SSNIP") on at least one product in the market, including at least one product sold by one of the merging firms" (Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines, § 4.1.1 (2010)). According to the guidelines, with some qualification, "the agencies most often rely upon a SSNIP of five percent" of the price paid by customers for the products or services to which the merging firms contribute value (Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines, § 4.1.2 (2010)).

[38] An early proponent of a multidisciplinary approach to understanding non-price considerations and effects in antitrust (including mergers) was FTC Commissioner Thomas Leary. Thomas B. Leary, *The Significance of Variety in*

- *What is specifically meant in the merger guidelines when referencing non-price effects involving product quality? Variety? Service? Innovation?*
- *How should each of these non-price effects be conceived of and understood?*
- *What insights are offered in economics?*
- *What insights are provided in other fields of inquiry?*
- *What additional understanding is required?*

Related questions concern the application of what is known about non-price competition into the analysis of a merger. This involves incorporation of what is known about competition involving product quality, variety, service, and innovation into each step of the analysis of a merger.[39] Importantly, this includes theories of the harms and benefits of a merger. The two most relevant economic theories of harm in a merger are unilateral effects[40] and coordinated effects.[41] Long-standing economic theories of the benefits of a merger include those that describe static efficiencies (e.g., economies of scale, scope, etc.).[42] According to Commissioner Rosch, other than a new section on innovation and product variety, the Guidelines are "silent"[43] with respect to non-price forms of competitive harm and, but for the Guideline's statement that it will employ an approach analogous to that used to evaluate price

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Antitrust Analysis, Federal Trade Commission (May 18, 2000) (Observing both the benefits and limitations of traditional antitrust analysis that "relies on economic models that generally assume commodity-like products," in a speech in 2000, Leary queries if "as the assumption of homogeneous commodity products becomes progressively less realistic in the real world, we need to ask the question whether the traditional models will continue to be so useful." He then goes on to describe the types of insights to be obtained from a multidisciplinary approach to antitrust. As one example, Leary describes the evolution and nature of goods found in mature societies as captured by two business consultants B. Joseph Pine II and James Gilmore, in their book "The Experience Economy" (1999). As described by the authors, competition and exchange in modern societies is more often based on experiences rather than commodities. These experiences go far beyond the production and marketing of differentiated goods to involve the development and staging of complex experiences that combine products and services in ways that provide economic value to consumers. Citing a range of examples across different sectors of the economy, Leary counsels that the implication of this evolution for antitrust analysis (including mergers) merits serious consideration given it fundamentally alters how goods and services are viewed and therefore understanding of variety and innovation.). See also Thomas B. Leary, *The Significance of Variety in Antitrust Analysis*, 68 ANTITRUST LAW JOURNAL 1007. Spencer Weber Waller, *The Language of Law and the Language of Business*, 52 CASE WESTERN RESERVE LAW REVIEW 283 (2001). B. Joseph Pine II and James Gilmore, THE EXPERIENCE ECONOMY (1999).

[39] As previously described this includes the steps of: defining the relevant market (i.e., Market Definition), analyzing the market's structure (i.e., Market Participants, Market Shares, and Market Concentration), evaluating applicable theories of harm (i.e., Unilateral Effects, Coordinated Effects), assessing relevant circumstances (i.e., Powerful Buyers, Entry, etc.), and appraising cognizable efficiencies (i.e., Efficiencies).

[40] "Unilateral effects" can arise where, as the result of a merger, there is an increased probability that competition between the offerings of two or more merging firms will be reduced, allowing the merged entity to unilaterally exercise market power in ways that harm consumers. In the context of price effects, this may occur where the merged firm profitably raises the price of one or both merging parties' offerings and thereby harm consumers.

[41] "Coordinated effects" can arise where, as the result of a merger, there is an increased probability that the merging parties and their competitors will successfully be able to coordinate their behavior in ways that reduce competition and harm consumers. In the context of price effects, this may occur where the merged firms and their competitors coordinate to profitably raise the price of their offerings and thereby harm consumers.

[42] See Gregory T. Gundlach and Diana M. Moss (2015), *The Role of Efficiencies in Antitrust Law: Introduction and Overview*, 60 ANTITRUST BULLETIN 91.

[43] Rosch (2014), at 116.

competition, there is "scant guidance"[44] for how to assess a merger's harmful effects on product quality or service. Despite offering a framework for analyzing the loss of product variety and a merger's effects on innovation (both harms and benefits), this framework also requires "significant fleshing out"[45] and "leave many questions unanswered."[46] Going forward it will be important that these challenges be addressed. In this respect, an approach that draws upon market, organizational, managerial and individual-level insights could prove beneficial. Insights from the business disciplines are likely to be of particular benefit. A hallmark of the business literatures is their development of managerial-level frameworks for understanding and aiding business decision-making. These frameworks offer potential to benefit existing guidance through elaborating on the managerial considerations and decisions associated with non-price competition involving product quality,[47] variety,[48] service,[49] and innovation.[50]

[44] Rosch (2014), at 117.
[45] Rosch (2014), at 117-18.
[46] Rosch (2014), at 118.
[47] See for example Peter N. Golder, Debanjan Mitra, & Christine Moorman, *What Is Quality? An Integrative Framework of Processes and States*, 76 JOURNAL OF MARKETING 1 (2012) (The authors present an integrative framework of quality that captures how firms and customers produce quality (the quality production process), how firms deliver and customers experience quality (the quality experience process), and how customers evaluate quality (the quality evaluation process)).
[48] See for example Murali K. Mantrala, Michael Levy, Barbara E. Kahn, Edward J. Fox, Peter Gaidarev, Bill Dankworth, Denish Shah, *Why is Assortment Planning so Difficult for Retailers? A Framework and Research Agenda*, 1 JOURNAL OF RETAILING 71 (2009) (The authors offer a conceptual model that describes the three primary inputs to product assortment decisions including consumer perceptions and preferences, retailer constraints, and environmental factors. Drawing on relevant research, these inputs and their implications for retail product assortment decisions involving product variety, product depth, and product service level are elaborated upon.). For more general discussions see related to antitrust see for example Joseph P. Guiltinan, *Choice and Variety in Antitrust Law: A Marketing Perspective*, 21 Journal of Public Policy & Marketing 260 (2002). Gregory T. Gundiach, *Choice as the Focus of Antitrust: A Marketing Perspective*, 62 UNIVERSITY OF PITTSBURGH LAW REVIEW 527 (2001).
[49] See for example S. L. Vargo and R. F. Lusch, *Evolving to a New Dominant Logic for Marketing*, 68 JOURNAL OF MARKETING 1 (2004) (The authors describe a revised perspective of markets, organizations, and economic exchange captured in the rubric "service-dominant logic." Building on the dominance of services in the economy, this perspective of value creation advances a logic that centers on service provision, rather than goods production. The primary tenets of the service-dominant logic are: (1) the conceptualization of service as a process, rather than a unit of output; (2) a focus on dynamic resources, such as knowledge and skills, rather than static resources, such as natural resources; and (3) an understanding of value as a collaborative process between providers and customers, rather than what producers create and deliver to customers. Taken to its logical conclusion, the service-dominate logic replaces goods-dominant logic in the conceptualization of contemporary exchange and consequently, how products, services, variety and innovation are viewed and understood.). See also R. F. Lusch, S. L. Vargo and G. Wessels, *Toward a Conceptual Foundation for Service Science: Contributions from Service-Dominant Logic*, 47 SYSTEMS JOURNAL 5, 6 (2008). Robert F. Lusch and Stephen L. Vargo, SERVICE-DOMINANT LOGIC: PREMISES, PERSPECTIVES, POSSIBILITIES (2014).
[50] See for example Mellissa Schilling, STRATEGIC MANAGEMENT OF TECHNOLOGICAL INNOVATION (2017) (The author presents a framework for understanding how innovation is approached as a strategic process including assessing competitive dynamics, strategy formulation, and strategy implementation. Drawing on relevant research and practice, each stage is elaborated upon).

Is there a need for clarity in the treatment of conflicts in the assessment of price and non-price effects?

Beyond the aforementioned questions, there are also questions about whether the guidelines sufficiently address conflicts that emerge in the assessment of price and non-price effects. According to Rosch "There may be cases where the predicted price effects of the merger suggest one enforcement outcome, but the innovation [or other non-price] effects suggest a different enforcement outcome."[51] An important inquiry regards how these conflicts should be resolved? There are also likely other questions as well. For example, in regard to presumptions, at what point should a structural presumption play a role in analyzing non-price effects such as found in innovation based markets. Important questions in this realm include:

- *How should conflicts in price and non-price effects be resolved when evaluating a merger?*
- *Should price effects trump non-price effects or vice versa?*
- *How should conflicts among non-price effects be addressed?*

Conclusion

Given the current state of affairs, further effort and work is needed to incorporate consideration of non-price competition and effects in US merger analysis. The AAI's symposium on the non-price effects of mergers is meant to motivate this work and, in multidisciplinary ways, add to the efforts of those interested in incorporating these considerations in US merger analysis.

[51] Rosch (2014), at 118-19. ("But section 6.4 leaves a number of other questions unresolved. There may be cases where the predicted price effects of the merger suggest one enforcement outcome, but the innovation effects suggest a different enforcement outcome. How should enforcers resolve this? On the one hand, it is widely asserted that technological progress benefits consumers to a greater degree than the elimination of non-competitive prices. This would suggest that the innovation analysis should trump short-run considerations. However, on the other hand, public law enforcement agencies must be careful not to look so far in the future that they ignore price effects on consumers in the interim.")